FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: May 24, 2006

SUBJECT: COMMENT: DRAFT AO 2006-19

Transmitted herewith is a timely submitted comment from Brian G. Svoboda on behalf of the Democratic Legislative Campaign Committee, regarding the above-captioned matter.

The proposed draft advisory opinion is on the agenda for Thursday, May 25, 2006.

Attachment

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May 24, 2006

BY FACSIMILE AND ELECTRONIC MAIL

The Honorable Michael Toner
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2006-19

Dear Chairman Toner:

On behalf of my client, the Democratic Legislative Campaign Committee, I write to comment on Draft Advisory Opinion 2006-19. The DLCC is an association of Democratic state legislators from across the nation; it supports Democratic legislative candidates and caucuses nationwide.

Because the DLCC and the caucuses it supports are subject to the restrictions on Federal Election Activity imposed by the Bipartisan Campaign Reform Act of 2002, they are keenly interested in, and apt to be affected by, whatever reasoning the Commission adopts in this opinion. The same is no less true of other nonfederal candidate slates and associations across the country, which are not "political committees" under the Federal Election Campaign Act of 1971, as amended, and which yet are equally subject to BCRA's Federal Election Activity restrictions.

The holding of Draft Advisory Opinion 2006-19 is broad and clear. Associations that send mail or sponsor autocalls on behalf of nonfederal candidates, and that mention the date of the election, must pay for the communications entirely with federally eligible funds, if their supported candidates share the ballot with federal candidates.

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The context in which the date is presented does not matter. "Because providing the date of the election is one of the GOTV activities identified in 11 C.F.R. 100.24(a)(3), LACDP's telephone scripts and direct-mail piece constitute GOTV activities, regardless of whether they indicate the times when the polls are open or the voter's particular polling location." Draft Opinion at 4. Nor does it matter when the mail is sent, if the deadline for federal candidate access to the primary ballot has already passed. "Activity conducted earlier than 72 hours before the election that meets the general definition of 'GOTV activity' in 11 C.F.R. 100.24(a)(3) is Type II FEA." Definition of Federal Election Activity, 71 Fed. Reg. 8,926, 8,930 (2006). Thus, for example, under the draft opinion's reasoning, an autocall sponsored by a caucus, sent the day after the primary, and saying, "Join us at a fundraiser for Legislator X, so he can have the resources he needs to win on November 7," would qualify as Federal Election Activity.

This arbitrary result does not flow necessarily from the statute. "Congress does not appear to have defined 'get-out-the-vote activity.'" *Shays v. FEC,* 337 F. Supp.2d 28, 102 (D.D.C. 2004). "The phrase itself is subject to different readings." *Id.* at 103. Instead, as with the soon-to-be-vacated interpretation of the coordination rules that curtailed federal candidate endorsements in state candidate-paid communications, *see, e.g.,* Advisory Opinion 2003-36, the draft opinion's outcome is the accumulative result of discrete, unconnected events in the history of BCRA's interpretation.

When it first defined GOTV activity, the Commission cited the election date as an example of a datum that might assist a voter if provided within 72 hours of the election. *See* 337 F. Supp.2d at 105 ("The Commission has made clear that providing a person with the date of the election constitutes GOTV activity if it occurs within 72 hours of an election."). Litigation then prompted the Commission to remove the 72-hour reference. *See id.* at 103-07; 71 Fed. Reg. at 8,930. Through a formalistic interpretation of the rule, the draft opinion would now have the Commission conclude that providing the date of the election through autocall or direct mail is invariably GOTV, if done after the FEA window has opened.

The path urged by the draft opinion would lead the Commission ever further away from the purpose and intent of the statute. The Commission can still turn away from that path. For example, it can reject the notion that an automated phone call or a direct mail piece is invariably a communication by "individualized means." 11 C.F.R.

100.24(a)(3). A voter has no practical choice but to interact with the canvasser at her doorstep, or the live caller on her phone line. She can freely delete the robocall from her answering machine without listening, or throw her mail away unread. These latter communications are not made "by individualized means," properly speaking. They are simply other forms of mass communication. The voter neither reads nor hears anything different than what anyone else is reading or hearing.

Moreover, the Commission can make it clear that to provide the date of the election does not invariably cause an individualized communication to become GOTV. There is a significant difference between a communication that simply refers to the date of the election, and one that provides the date together with other information for the purpose of assisting the voter. The draft opinion ignores that difference; the Commission should not.

The sweeping scope of the Federal Election Activity restrictions makes it all the more important for the Commission to be careful and precise in their interpretation. Unlike BCRA's "soft money" fundraising restrictions, the FEA rules do not apply just to those whose involvement in federal elections is documented and unmistakable. Rather, the FEA rules apply to every legislative caucus and local party, even to slates of local candidates. It remains to be seen whether aggressive interpretation of the FEA restrictions against such actors can be judicially sustained, absent a bona fide purpose of influencing federal elections. For now, the Commission should apply these restrictions carefully to bona fide nonfederal actors, and not with the arbitrariness urged by the draft opinion.

As before, I appreciate the opportunity to comment on these matters.

Very truly yours,

Brian G. Svoboda
Counsel to the DLCC

cc: Vice Chairman Lenhard (via electronic mail)
Commissioner Mason (via electronic mail)
Commissioner von Spakofsky (via electronic mail)
Commissioner Walther (via electronic mail)
Commissioner Weintraub (via electronic mail)
Ms. Mary Dove, Commission Secretary (via facsimile)
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